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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re D.M., a Person Coming
Under the Juvenile Court Law.

B294121
(Los Angeles County
Super. Ct. No. DK12543)

LOS ANGELES COUNTY
DEPARTMENT OF
CHILDREN AND FAMILY
SERVICES,

Plaintiff and Respondent,

v.

C.K.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Nancy Ramirez, Judge. Affirmed.

Jane B. Winer, under appointment by the Court of Appeal for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles,
Assistant County Counsel and Peter Ferrera, Principal Deputy
County Counsel, for Plaintiff and Respondent.

On October 20, 2015, the Department of Children and Family Services (the Department) filed a Welfare and Institutions Code¹ section 300 petition alleging mother's methamphetamine abuse placed her son D.M. at substantial risk of harm. D.M. was detained from mother, and the petition was sustained. After D.M. was later returned to mother's home, she tested positive for methamphetamine. The juvenile court sustained the supplemental petition, terminated mother's reunification services and scheduled a permanency plan hearing. The court subsequently ordered adoption as D.M.'s permanent plan, and terminated mother's parental rights. Mother now appeals from that order, contending the juvenile court erred in concluding it lacked discretion to continue her services and in denying her request to testify at the permanent plan hearing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In October 2015, the Department took four-year-old D.M. into protective custody. The Department intervened in response

¹ Further statutory references are to the Welfare and Institutions Code.

to a report of general neglect, that mother used methamphetamine and kept a filthy home.²

The Department conducted an investigation. Mother denied using drugs, contrary to the claims of relatives. Initially, the condition of mother's home appeared to be safe and clean, but two weeks later, during an announced visit, it was found to be unsanitary; carpets were soiled with dog feces and dog urine.

Records showed a 2013 referral alleging general neglect. Mother admitted using methamphetamine and agreed to voluntary family maintenance services. She entered a residential drug treatment facility, where she was permitted to bring her son. Mother's criminal history included convictions for burglary, possession for sale of a controlled substance, and possession of a stolen vehicle. Mother, who was born in March 1990, later acknowledged having used methamphetamine "on and off" since she was 15 years old.

On October 20, 2015, the juvenile court ordered D.M. detained with maternal aunt (one of mother's sisters). On February 1, 2016, the court sustained the allegations of the amended petition, declared D.M. a dependent under section 300, subdivision (b) (failure to protect), committed his care and custody to the Department, and ordered the Department to provide family reunification services to mother with monitored visitation. Mother was ordered to participate in a drug program, parenting and individual counseling for anger issues, and to submit to random drug testing.

² DNA testing revealed the man identified as D.M.'s father, who was incarcerated at the time, was not his biological father. The juvenile court also found the man was not an alleged or presumed father.

After moving into maternal aunt's home, D.M. was enrolled in preschool and began working with therapists to lessen his tantrums and disruptive behavior, which were symptomatic of ADHD. Maternal aunt took D.M. to his required medical appointments and facilitated monitored visits, although mother's visitation was inconsistent.

At the August 2, 2016 six-month review hearing (§ 366.21, subd. (e)), the Department reported mother had missed 13 scheduled drug tests. The juvenile court found mother was in compliance with the case plan and reasonable services had been provided. The court ordered the Department to continue family reunification services and to provide mother another referral for drug testing.

On September 7, 2016, mother was discharged from an outpatient drug treatment center after testing positive for methamphetamine. Between September and December 2016, she missed 13 scheduled drug tests. During that time, mother limited her contact with D.M. to 10-minute telephone and Facetime conversations one to three times each week. She requested no in-person visits.

After missing four scheduled drug tests and once testing positive for cannabinoids in January 2017, mother began complying with the court's orders and showing progress. From February through June 2017, she attended Narcotics Anonymous meetings, completed a three-month drug treatment program, submitted to weekly drug testing with negative results and participated in court-ordered classes and counseling. In May 2017, mother reportedly had successful overnight visits with D.M.

On June 29, 2017, at the 12-month review hearing

(§ 366.21, subd. (f)), the juvenile court terminated the suitable placement order and ordered D.M. placed in mother's home. The Department was ordered to provide family maintenance services. Mother was ordered to enroll in an aftercare program and to submit to weekly random drug testing. A section 364 review hearing was set.

On August 15, 2017, the Department filed a supplemental petition (§ 387), following D.M.'s detention from mother on August 10, 2017. The petition alleged the previous disposition had not been effective in protecting D.M. in that mother had tested positive for methamphetamine and amphetamine on August 1, 2017 and was under the influence on July 29, 2017 and on prior occasions, and had missed drug tests on five dates in July 2017. The juvenile court ordered D.M. to remain detained with maternal aunt and mother to have monitored visits and telephone calls.

The supplemental petition was adjudicated on January 25, 2018. The juvenile court found the allegations true and sustained the petition. The court determined the time for which mother could receive reunification services had expired and her substance abuse problem was not yet resolved. The court ordered the Department to facilitate monitored visitation and scheduled a permanency planning hearing (§ 366.26).

In September 2018, mother was incarcerated in county jail for having violated her probation.

At the contested permanency planning hearing on November 14, 2018, mother appeared in custody with her attorney. The juvenile court denied mother's motion to testify. The court found mother had failed to establish the merits of the

exception to termination (§ 366.26, subd. (c)(1)(B)(i) [regular visitation and contact]) and terminated parental rights.

Mother filed a timely notice of appeal.³

DISCUSSION

A. Extension of Services

After sustaining the supplemental petition, the juvenile court declined to extend mother's reunification services. The court concluded the 18-month maximum period for such court-ordered services had expired and mother had not resolved her drug abuse.

Mother contends the juvenile court had discretion, of which it was unaware and thus failed to exercise in violation of due process, to extend reunification services beyond the statutory

³ Generally, an order terminating reunification services and setting a permanency planning hearing must be challenged by a writ petition in order to preserve any issues for review following the order terminating parental rights. (*In re Zeth* (2003) 31 Cal.4th 396, 413; § 366.26, subd. (1).) It is, however, undisputed that mother was never advised of the writ requirement because she was not present when the setting order was made and was never given notice by mail. In such instances, good cause exists to consider issues relating to the setting hearing in an appeal from an order terminating parental rights. (See *In re A.A.* (2011) 243 Cal.App.4th 1220, 1242-1245.) Accordingly, the exception to the writ requirement applies and mother may challenge the termination of her services on appeal.

maximum date. Mother maintains an extension of services was warranted because the services she received were inadequate.

Family reunification services serve a critical function in dependency proceedings. (*In re M.F.* (2019) 32 Cal.App.5th 1, 13.) Section 361.5, subdivision (a) generally mandates that reunification services be provided whenever a child is removed from the parents' custody. (*In re Luke L.* (1996) 44 Cal.App.4th 670, 678.) That reasonable services be afforded is a requirement of due process. (*In re Daniel G.* (1994) 25 Cal.App.4th 1205, 1215-1216 (*Daniel G.*) As pertinent here, when a child is three years of age or older at the time of removal, reunification services are presumptively limited to 12 months (§ 361.5, subd. (a)(1)(A)), with a possible extension of up to 18 months pursuant to certain findings, including that reasonable services have not been provided. (§ 361.5, subd. (a)(3)(A); *Amanda H. v. Superior Court* (2008) 166 Cal.App.4th 1340, 1345.) Since 2009, section 361.5, subdivision (a)(3)(A) has enabled reunification services to be extended up to 24 months "only if [the court] finds that it is in the child's best interest to have the time period extended and that there is a substantial probability that the child will be returned to the physical custody of his or her parent or guardian who is described in subdivision (b) of Section 366.22 within the extended time period, or that reasonable services have not been provided to the parent or guardian." (§ 361.5, subd. (a)(4)(A).)

The section 361.5 timelines for reunification services do not revert to "square one" when a section 387 petition is sustained. (*Carolyn R. v. Superior Court* (1995) 41 Cal.App.4th 159, 166 (*Carolyn R.*) Instead, the juvenile court must decide whether reunification services should resume, by taking into account the services already received and the amount of time remaining to

provide such services. (*Ibid*; *In re A.C.* (2008) 169 Cal.App.4th 636, 648 [“[O]nce the section 361.5 clock begins, it continues to run despite a placement of the child with a parent during the dependency”].) Failure to order additional services when a child is removed incident to a supplemental petition is reversed only for an abuse of discretion. (*Carolyn R., supra*, 41 Cal.App.4th at pp. 166-167.)

As the juvenile court found when it sustained the supplemental petition on January 25, 2018, the dependency proceedings had passed the 12-month mark (October 2016) and 18-month mark (April 2016) for reunification services. (§§ 361.5, subds. (a)(1) & (3).) Further, both parties acknowledge the proceedings had passed the 24-month mark, the maximum statutory period for mother to be provided services. As of January 25, 2018, mother had received 27 months of services, including the 42 days of family maintenance services while D.M. was placed with her. (See *In re N.M.* (2003) 108 Cal.App.4th 845, 853 [statutory limitation (then 18-months) of § 361.5, subd. (a) applies to combination of reunification and maintenance services].) Thus, under the circumstances, further services would ordinarily not have been an option and the juvenile court would have been obligated to set a permanency plan hearing. (See Cal. Rules of Court, Rule 5.565 (f).)

Despite the maximum 24-month limitation set forth in section 361.5, subdivision (a)(4)(A), the juvenile court may, in rare instances involving exceptional circumstances, continue reunification services beyond the statutory cutoff. (See e.g., *Mark N. v. Superior Court* (1998) 60 Cal.App.4th 996, 1012, 1015 [child welfare agency failed to contact father “during 13 months of the 17-month reunification period” and did not attempt to reunify

incarcerated father with daughter]; *Daniel G.*, *supra*, 25 Cal.App.4th 205, 216 [reunification plan for mentally disabled mother was a “disgrace”]; *In re Elizabeth R.* (1995) 35 Cal.App.4th 1774 [mother was hospitalized during most of the reunification period, after she was released welfare agency attempted to restrict visitation]; *In re Brittany S.* (1993) 17 Cal.App.4th 1399, 1407 [incarcerated mother not provided reasonable visitation]; *In re Dino E.* (1992) 6 Cal.App.4th 1768, 1777-1778 [welfare agency never developed a reunification plan for the father].)

To be sure, none of these decisions approved extending reunification services beyond the current 24-month maximum. They predated the amendment to section 361.5 increasing the statutory maximum in certain instances from 18 to 24 months. While the Legislature has been concerned with reducing delay in reaching a permanent resolution of a child’s placement (see *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 246-247), we do not believe that by increasing the statutory maximum, the Legislature meant to weaken the juvenile court’s inherent discretion to extend services beyond that maximum in exceptional circumstances, especially given the extent to which the Legislature has sought to ensure sufficient services are provided to families.

As illustrated by the preceding cases, the “extraordinary circumstances which militated in favor of extension of family reunification services beyond [the statutory] limit . . . uniformly involved some external factor which prevented the parent from participating in the case plan.” (*Andrea L. v. Superior Court* (1998) 64 Cal.App.4th 1377, 1388.) Alternatively, when extraordinary special needs are not at issue, the juvenile court’s

extension beyond the statutory maximum is an abuse of discretion and in excess of the court's jurisdiction as limited by statute. (*Denny H. v. Superior Court* (2005) 131 Cal.App.4th 1501, 1511; *Los Angeles Dept. of Children etc. Services v. Superior Court* (1997) 60 Cal.App.4th 1088, 1091-1092.)

Mother contends the family maintenance plan was inadequate to help her care for D.M., which prompted her relapse. She asserts the Department knew that D.M. had severe behavioral issues as reflected in his ADHD diagnosis and that she was experiencing stress in dealing with these issues and required some respite care. In arguing the maintenance plan was deficient, mother relies primarily on *Daniel G., supra*, 25 Cal.App.4th 205. In that case, the juvenile court characterized the reunification services offered to the mentally disabled mother as a "disgrace" but nonetheless it felt constrained to order a hearing on a permanent plan because the 18-month hearing date had arrived. (*Id.* at p. 1216.) The appellate court held the mother's services should have been extended beyond the statutory maximum. Even though the mother may never have realistically been able to care for her son, the court criticized the Department for failing to contact the mother for the last 12 of the 18 months of the reunification period to investigate whether the mother and son could be housed together in a facility, to learn whether the mother was progressing toward an independent living situation, and to arrange court-ordered weekly visits. (*Ibid.*)

The present case falls far short of the extraordinary circumstances of *Daniel G.* Here, the Department provided specific maintenance services to help mother and son address his behavioral issues. D.M. was ordered returned to mother's home

on June 29, 2017. Between July 6 and August 1, 2017, mother met four times with one or more social workers or other support staff either in mother's home or at the local Department office. On each occasion, social workers elicited mother's comments about her relationship with D.M. and observed D.M.'s interactions with mother and visiting family members. On July 6, 2017, mother expressed growing concerns about D.M.'s volatile behavior and agreed he should have therapy. She also reported feeling stable, supported and happy. On July 11, 2017, D.M. interrupted mother's meeting with social workers by screaming and having a physical altercation with a cousin. After initially resisting, D.M. then complied with his mother's directive to go to his room for a "timeout." The social worker suggested mother seek wraparound services for D.M., and she agreed.⁴ The next day, the social worker informed mother the wraparound services referral had been submitted.

On July 27, 2018, the social worker telephoned mother to ask about missed drug testing, which mother attributed to her difficulties caring for D.M. Mother declined the social worker's offer to watch D.M. during the drug tests, explaining her son would be returning to school on August 8, 2017, which would make it easier for her to test.

During next day's home-visit, mother voiced her concern to the social worker that D.M.'s behavior had not improved; he was

⁴ Wraparound services are "community-based intervention services that emphasize the strengths of the child and family and includes the delivery of coordinated, highly individualized unconditional services to address needs and achieve positive outcomes in their lives." (§ 18251, subd. (d); see also § 18250, subd. (a).)

becoming more physical and obstreperous. After watching D.M.'s defiant and aggressive behavior and demands for attention on this occasion, the social worker advised mother how wraparound services, which were to begin the following week, would help her. On August 1, 2017, mother met with the social worker and the Wraparound services team and discussed managing D.M.'s behavioral issues, setting boundaries and regular schedules and working with D.M.'s school. Later the same day, mother tested positive for methamphetamines and amphetamines, indicating she had used the drugs in the last one to three days. (On July 28, 2017, Mother had checked in with the testing facility for an on-demand drug test, was reportedly unable to produce a urine sample and left the facility.) When the social worker asked what had triggered her relapse, mother explained she was "stressed" over her boyfriend's failure to understand her "situation with her son" and was not feeling emotionally supported by him. D.M. was subsequently detained and the supplemental (§ 387) petition was filed.

Unlike *Daniel G.*, the Department kept in close contact with mother, solicited and assessed her and her son's emotional needs, and in response, initiated the necessary support services. Despite these services, mother asserts her efforts to unify with D.M. were stymied by the lack of sufficient Department intervention, which, she contends, violated her rights to due process. From our review of the record, this was not the reason mother's reunification efforts failed. Rather, reunification failed because, as the juvenile court concluded, mother had not made the progress necessary in treating her drug abuse to be able to reunify with her son successfully. During the time D.M. was in mother's home, the social worker repeatedly reminded mother to

comply with court-ordered treatment and testing, and offered to watch D.M. so mother could be tested. Yet, mother failed to comply with her testing obligation until August 1, 2017, when she tested positive. Mother's lack of success was of her own making. It did not involve extraordinary circumstances or "some external factor which prevented [mother] from participating in the [family maintenance] plan." (*Andrea L. v. Superior Court*, *supra*, 64 Cal.App.4th at p. 1388.) In sum, the juvenile court did not abuse its discretion or violate mother's due process rights by not extending her services.

B. Mother's Right to Testify at the Section 366.26 Hearing

At a hearing under section 366.26, the court must select and implement a permanent plan for a dependent child. Where there is no probability of reunification with a parent, adoption is the preferred permanent plan. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.) To implement adoption as the permanent plan, the juvenile court must find, by clear and convincing evidence, the child is likely to be adopted if parental rights are terminated. (§ 366.26, subd. (c)(1).) Then, in the absence of evidence that termination of parental rights would be detrimental to the child under statutorily-specified exceptions (§ 366.26, subd. (c)(1)(A)-(B)), the juvenile court "shall terminate parental rights." (§ 366.26, subd. (c)(1).) One of the statutory exceptions to termination is contained in section 366.26, subdivision (c)(1)(B)(i), which permits the court to order some other permanent plan if "[t]he parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship."

The Department bears the burden of proving a child is adoptable. (*In re A.A.* (2008) 167 Cal.App.4th 1292, 1317.) The parent has the burden of proving an exception applies. (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527.)

On issues where a parent has the burden of proof, such as the existence of an exception to termination of parental rights, parents have statutory and due process rights to present relevant evidence of significant probative value to the issue before the court. (§ 366.26, subd. (b) [statutory rights]; *In re Grace P.* (2017) 8 Cal.App.5th 605, 612 [due process rights].) A juvenile court may require an offer of proof before conducting a contested section 366.26 hearing on issues where the parent has the burden of proof. (*In re Grace P., supra*, 8 Cal.App.5th at p. 612.)

At the November 14, 2018, contested section 366.26 hearing, the juvenile court reviewed the Department's reports commencing with the August 2, 2015 status report through the last-minute information filed in July 2018. The reports, as described by the court, indicated mother's visits and telephone calls were frequently curtailed, cancelled, delayed and sporadic. Throughout the three years of the dependency proceedings, mother failed to maintain consistent communication with D.M.

Mother's counsel asked that mother to be allowed to testify about "explanations" for the "missed visits." The juvenile court stated the record of mother's missed visits was "voluminous" and denied the request. The court found mother had failed to show regular contact and visitation with D.M. to satisfy the parental bond exception.

Although the juvenile court did not seek an offer of proof, mother's counsel argued maternal aunt did not abide by the telephone and visitation schedules and would not answer the

telephone. Mother also lacked transportation at times, but she did visit when the monitor provided transportation. Counsel argued mother's testimony would show maternal aunt thwarted mother's efforts to maintain regular contact with D.M. and there were transportation issues beyond mother's control.⁵ Counsel's argument essentially was an offer of proof.

Mother maintains the juvenile court abused its discretion and violated her due process rights by refusing her request to testify effectively, precluding her from establishing that the parental bond exception to adoption applied.

We review the juvenile court's decision to deny a contested hearing based on an offer of proof for abuse of discretion. (*In re Grace P.*, *supra*, 8 Cal.App.5th at p. 611.)

Given the offer of proof by mother's counsel, the juvenile court properly declined to hear mother's testimony. While a parent's excuses for lack of visitation may be relevant prior to termination of reunification services, after services have been terminated, the focus of the dependency proceedings changes from maintaining biological ties to providing stability and permanence for the children. (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1147-1148.) That time in this case had long since passed. The court did not abuse its discretion or violate mother's due process by refusing to allow her to justify her reasons for irregular visitation.

⁵ The record contains mother's signed affidavit that she had no transportation issues.

DISPOSITION

The juvenile court's section 366.26 order terminating mother's parental rights and ordering adoption as D.M.'s permanent case plan is affirmed.

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CURREY, J.

We concur:

WILLHITE, Acting P.J.

COLLINS, J.